92-499

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner, Cross-Respondent,

v.

SAC AND FOX NATION,

Respondent, Cross-Petitioner.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

G. WILLIAM RICE, Esq.*
Attorney General
SAC and Fox Nation

GREGORY H. BIGLER, Esq.
Assistant Attorney General

124 N. Cleveland
Cushing, Oklahoma 74023
(918) 225-4800

Attorneys for Cross-Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PRELIMINARY MATTER
QUESTIONS PRESENTED

1. Whether the State of Oklahoma has lawful authority to tax the income of (a) non-member Indians and (b) non-Indians who are employed by the Sac and Fox Nation or others within the Indian Country of the Sac and Fox Nation.

2. Whether the State of Oklahoma has lawful authority to impose its excise taxes, registration, and licensing requirements (including payment of the motor vehicle license tax) upon motor vehicles owned by (a) non-member Indians and (b) non-Indians when those vehicles are principally garaged within the Indian Country of the Sac and Fox Nation.

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OKLAHOMA TAX COMMISSION,

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SAC AND FOX NATION,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

The Sac and Fox Nation respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 16, 1992. The Oklahoma Tax Commission previously filed its Petition for Writ of Certiorari from the same judgment, which has been docketed as No. 92-259 in this Court. This Petition is filed within the time allowed by Rule 13.1 of the Rules of this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 967 F.2d 1425 (10th Cir. 1992) and is reprinted in "Appendix A" (Page A-1) to the Oklahoma Tax Commission's Petition for Writ of Certiorari docketed as No. 92-259 in this Court. The Order granting and denying the cross-motions for summary judgment, and the Order on Rehearing concerning the same motions by the United States District Court for the Western District of Oklahoma have not been reported. They are reproduced as "Appendix B" (Page A-9) and Appendix C (Page A-14) to the Oklahoma Tax Commission's Petition for Writ of Certiorari docketed as No. 92-259 in this Court.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion and judgment on June 16, 1992, and no rehearing was sought. This Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED IN THE CASE

I. Treaty of January 9, 1789 at Fort Harmar, 7 Stat. 28, Proclaimed September 27, 1789.

> ARTICLE II. And whereas at the before mentioned treaty it was agreed between the United States and said nations, that a boundary line

should be fixed between the lands of those nations and the territory of the United States; which boundary is as follows, . . . to the end that the same may remain as a division line between the lands of the United States of America, and the lands of said nation, forever. And [the nations] quit claim, relinquish and cede to the said United States, all the land east, south and west of the lines above described, so far as the said Indians formerly claimed the same; for them the said United States to have and to hold the same in true and absolute propriety forever.

ARTICLE III. The United States of America do by these presents relinquish and quit claim to the said nations respectively, all the lands lying between the limits above described, for them the said Indians to live and hunt upon, and otherwise occupy as they shall see fit: But the said nations, or either of them, shall not be at liberty to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, not to the subjects or citizens of the United States.

ARTICLE V. It is agreed that if any Indian or Indians of the nations before mentioned, shall commit a murder or robbery on any of the citizens of the United States, the nation or tribe to which the offender belongs, on complaint being made, shall deliver up the person or persons complained of, at the nearest post of the United States; to the end that he or they may be tried, and if found guilty, punished according to the laws established in the territory of the United States north-west of the river Ohio, for the punishment of such offenses, if the same shall have

been committed within said territory; or according to the laws of the State where the offence may have been committed, if the same has happened in any of the United States. In like manner, if any subject or citizen of the United States shall commit murder or robbery on any Indian or Indians of said nations, upon complaint being made thereof, he or they shall be arrested, tried and punished agreeable to the laws of the state or of the territory wherein the offence was committed; that nothing may interrupt the peace and harmony now established between the United States and said nations.

ARTICLE VII. Trade shall be opened with the said nations, and they do hereby respectively engage to afford protection to the persons and property of such as may be duly licensed to reside among them for the purposes of trade, and to their agents, factors and servants; but no person shall be permitted to reside at their towns, or at their hunting camps, as a trader, who is not furnished with a license for that purpose, under the hand and seal of the Governor of the territory of the United States northwest of the Ohio, for the time being, or under the hand and seal of one of his deputies for the management of Indian affairs; to the end that they may not be imposed upon in their traffic. And if any person or persons shall intrude themselves without such license, they promise to apprehend him or them, and to bring them to the said Governor, or one of his deputies, for the purpose before mentioned, to be dealt with according to law: And that they may be defended against persons who might attempt to forge such licenses, they further engage to give information to the said Governor, or one of his

deputies, of the names of all traders residing among them from time to time, and at least once in every year.

ARTICLE IX. If any person or persons, citizens or subjects of the United States, or any other person not being an Indian, shall presume to settle upon the lands confirmed to the said nations, he and they shall be out of the protection of the United States; and the said nations may punish him or them in such manner as they see fit.

II. Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267 (1906)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided,* That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

. . . .

> Sec. 3. That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory . . . whereupon the said convention shall, and is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide in said constitution –
>
> . . . .
>
> Third. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States.
>
> . . . .

STATEMENT OF THE CASE

I. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

In 1789, the Treaty of Fort Harmar, 7 Stat. 28, cut from the whole cloth the political and legal relationship

between the United States and the Sac and Fox Nation, a party to that treaty. This treaty authorized and recognized the tribal right and responsibility to protect and control trade by non-tribal members within the Tribal territory. It also, in explicit language, provided for extradition of tribal members committing certain offenses outside the lands reserved to the Tribe, punishment for non-Indians who committed certain crimes against tribal members outside the lands reserved to the Tribes, and explicitly recognized tribal authority to punish non-Indian citizens or subjects of the United States who settle upon tribal lands. Through a series of land transactions, which did little to change the nature of this relationship other than to repeatedly reconfirm the rights of the Sac and Fox to self-government, the Sac and Fox people were removed from their original homeland to a reservation in what is now the State of Oklahoma.

In 1890 the Territory of Oklahoma was formed by Act of Congress, and in 1891, the Sac and Fox entered into an allotment agreement ratified by the National Council of the Sac and Fox Nation, and by the United States through the Act of February 13, 1891, 26 Stat. 749 (1891). Documents in the record show that the Interior Department continued to recognize the existence of the Sac and Fox reservation after Oklahoma was admitted to the Union in 1907 pursuant to the Act of June 16, 1906, 34 Stat. 267 (1906) which reserved all the rights of Indians and Indian Tribes, and required Oklahoma to disclaim ownership and jurisdiction over same and their lands.

Organized pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and the Oklahoma Indian

Welfare Act of June 26, 1936, 49 Stat. 1967, with a Constitution and Corporate Charter approved by the Secretary of the Interior, the Sac and Fox Nation has taken full advantage of the policies of Congress encouraging tribal self-government and promoting tribal economic development. In accordance with the Indian Self-Determination Act of January 4, 1975, Pub.L. 93-638, 88 Stat. 2203, as amended and supplemented, the Sac and Fox Nation has contracted all non-trust Bureau of Indian Affairs services and programs, being one of the participants in the Congressionally mandated Self-Governance Demonstration Project. In order to develop governmentally, the Nation has created a constitutional independent judiciary, and provided for extensive governmental services to all persons within the Tribal jurisdiction, including police and fire protection, courts, juvenile services, health, education, and other governmental services, which it provides through local community offices and its Capital complex, located upon approximately 1000 acres of contiguous trust land containing governmental service units, recreational areas, living quarters, and a mobile home park. In order to fund this development and provide services to the public, the Tribe, with the assistance of the Federal Government, created a Tribal Tax Commission which is responsible for the collection of a wide range of tribal taxes including an earnings tax on wages earned within the Indian Country, and a motor vehicle tax, title, and registration system for motor vehicles garaged within the Indian Country.

The authority of the Sac and Fox Nation to levy and collect these taxes is beyond question, and has never been at issue in this case. The record indicates that as early as

1893, the Interior Department concluded that Oklahoma Territorial authorities could not tax non-Indians doing business within the Sac and Fox Indian Country or government employees therein, and the United States Attorney served notice that he was prepared to enjoin any attempt to tax Indians. Notwithstanding the position of the Federal officials charged with protecting the Tribe from such encroachment and the Sac and Fox treaty rights, the State of Oklahoma has continued to attempt to levy and collect taxes in the Indian Country of the Tribe.

As a consequence of the Tribe's participation in the federally established Self-Determination and Self-Governance Demonstration Projects, and federally supported economic development projects, the bureaucracy of the Sac and Fox Government and employment within the Sac and Fox Indian Country has grown to include both members of other federally recognized Indian Tribes and non-Indians. In addition, intermarriage of Sac and Fox tribal members with other Indians and non-Indians have brought many such persons within the Sac and Fox Indian Country, some of whom now hold title to Sac and Fox trust allotments through the process of descent and distribution as provided by federal law.

While the Oklahoma Tax Commission was attempting to levy and collect taxes upon the income of elected Tribal officials and Tribal employees, the State Highway Patrol and local police of several towns within the Sac and Fox Indian Country began to issue criminal traffic citations for driving a vehicle upon which taxes due the state had not been paid or for failure to display a proper tag to persons (both tribal members and non-members) driving motor vehicles registered and titled by the

Nation, and in some cases impounded the vehicles. The State District Courts dismissed these charges holding that the State had no jurisdiction to levy or collect the tax claimed to be due. At least one of these cases was appealed by the State to the Oklahoma Court of Criminal Appeals, which dismissed the appeal.

In the meantime, the Oklahoma Tax Commission took a new tack. Since the state courts would not directly require persons garaging their vehicles in the Sac and Fox Indian Country to obtain a state tag and pay state taxes, the Commission waited until the Indian Country resident attempted to trade the car to a dealer, or sold the car to someone residing outside the Indian Country, and for whom the Sac and Fox would not issue a tag. Upon the happening of such event, the Oklahoma Tax Commission would require the purchaser to pay all "back" taxes, penalties, and interest claimed by it to be due before it would issue the purchaser a new Oklahoma title and registration.

Faced with a posture by the Oklahoma Tax Commission which rendered tribally titled and registered vehicles unmarketable, and with terminating some tribal employees or finding additional revenue to make up salary differences which would result from a requirement to pay additional state taxes, the Sac and Fox Nation filed this suit in the United States District Court for the Western District of Oklahoma. On cross-motions for summary judgment, the Court followed the "Indian smokeshop" line of authority from this Court, and held that tribal members were exempt from State taxation, but that Indian members of other tribes and non-Indians were not. The Sac and Fox Nation appealed to the United States

Court of Appeals for the Tenth Circuit, which affirmed the District Court. Both the Oklahoma Tax Commission and the Sac and Fox Nation have petitioned for review of the decision of the United States Court of Appeals by Writ of Certiorari from this Court.

II. JURISDICTION OF THE COURT OF FIRST INSTANCE

The jurisdiction of the United States District Court for the Western District of Oklahoma was invoked pursuant to 28 U.S.C. § 1362 in that the Sac and Fox Nation is a federally recognized Indian Tribe, Band, or Nation, and the case arose under the Constitution, laws, and treaties of the United States.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED THE FEDERAL QUESTIONS IN THIS ACTION IN A WAY WHICH CONFLICTS WITH THE DECISIONS OF SEVERAL STATE COURTS OF LAST RESORT.

Several State Courts of last resort have squarely held that the income or property of Indians who are not members of the local tribe within whose Indian Country they reside are not subject to taxation by the state. In *Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (N.Mex.App. 1975) the Court of Appeals of New Mexico squarely held that a Comanche Indian from Oklahoma residing upon the Navajo Indian Reservation in New Mexico was a "reservation Indian" as that term was used

in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973) and was not subject to state income taxes imposed by the State of New Mexico. Following *Fox*, the Supreme Court of Montana held that an enrolled member of the Turtle Mountain Chippewa Tribe married to a member of the local Assiniboine-Sioux Tribe of the Fort Peck Reservation, and a person of mixed Red Lake Chippewa and Turtle Mountain Chippewa heritage not enrolled in any Tribe, but residing upon the Fort Peck Reservation and owning land there, could not be taxed by the State of Montana. *LaRogue v. State*, 583 P.2d 1059 (Mont. 1978). Finally, in a case in which the Federal Government as Amicus Curiae "strongly" supported the position of the Indian, the Supreme Court of Minnesota held that the income of an enrolled member of the Tulalip Tribe of Indians in the State of Washington who lived within the Red Lake Indian Reservation in Minnesota and was employed there by the Bureau of Indian Affairs was not subject to the state income tax. *Topash v. Commissioner of Revenue*, 291 N.W.2d 679 (Minn. 1980). *See also, White Eagle v. Dorgan*, 209 N.W.2d 621 (N.Dak. 1973); and *Red Lake Band of Chippewa Indians v. State*, 248 N.W.2d 722 (Minn. 1976) (car tags).

Each of these cases relied upon the doctrines of federal preemption and tribal self-government as expressed in *McClanahan* and other cases, under the commonly held understanding that the term "reservation Indian" as used therein meant *any* Indian, regardless of tribal membership, who lived within the local community of Indians within the Indian Country, and that State action was generally preempted absent explicit Congressional consent in accordance with the traditional doctrine espoused in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In

addition, this Court has squarely held that a state income tax cannot be applied under numerous circumstances to non-Indians earning income within the Indian County. *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona Tax Commission*, 448 U.S. 160 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

Even the Oklahoma Tax Commission recognizes that the Sac and Fox Treaties after the Treaty of Fort Harmar constitute a series of land transactions, *See*, Petition for Writ of Certiorari in No. 92-259 at page 7. In other words, while much water may have passed under the bridge, and the land upon which the provisions of the Fort Harmar treaty stipulations would act may have been changed, neither Congress nor the Sac and Fox Nation have seen fit to repeal or otherwise modify the jurisdictional relationship and the authority of the Sac and Fox Nation as recognized in that Treaty. Simply stated, times may have changed, but the law has not. Until Congress says otherwise, it was error for the Court below to fail to interpret this treaty in line with this Court's oft expressed directives that all treaty provisions are to be read as the Indians would have understood them, and to interpret all ambiguous language of the treaty to the Indians benefit. In failing to do so, and in failing to conduct a careful federal preemption/infringement upon tribal self-government analysis, the Court below reached a result in direct conflict with several state courts of last resort. Certiorari should be granted, in this case of first impression in this Court, to resolve these issues.

II. THE COURT BELOW FAILED TO CORRECTLY APPLY THE CONTROLLING DECISIONS OF THIS COURT, AND THE DECISIONS OF THIS COURT APPLIED BY THE COURT BELOW SHOULD BE RECONSIDERED IN LIGHT OF RECENT CONGRESSIONAL ACTION

A. The Tenth Circuit Failed to Correctly Apply the Controlling Decisions of this Court.

As the 10th Circuit noted, the Supreme Court has never explicitly addressed the state taxation of non-member income derived from tribal sources. *Sac and Fox Nation v. Oklahoma Tax Commission,* 967 F.2d 1425 at 1429 (1992). Thus this case presents an important and unresolved area of federal law. Notwithstanding the foregoing, this Court has given some broad guidelines that mitigate in favor of Cross-Petitioner Sac and Fox Nation:

> While under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, such authority may be asserted only if not preempted by the operation of federal law. (citations omitted)

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983). This case involves both Indians who are not members of the Sac and Fox Nation and non-Indians who earn their income, or principally garage their automobiles within the Indian Country of the Nation. It is the Nation's position that the relevant treaty provisions, as well as the jurisdictional principals expressed and supported by Congress, and traditionally by this Court, require that the

Court resolve the issues herein in favor of the Sac and Fox Nation.

Cross-Petitioner asserts the Tenth Circuit misapplied the preemption test when it ruled the state could tax non-members income derived from tribal sources and automobiles garaged within the Indian Country. For the purposes of income tax and car tags the court should have looked to decisions on state taxation where the Supreme Court's preemption analysis found the states could not interfere with operations involving non-Indians having substantial contacts to Indian Country and effecting important tribal matters. See *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) (preemption of state taxes on non-Indian forestry operations); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) (no state regulation of gaming within Indian Country).

Bracker, Cabazon and *Central Machinery Co. v. Arizona Tax Commission,* 448 U.S. 160 (1980) together dictate that the tribally derived income should have been exempt from state taxation. The lower court failed to distinguish the Supreme Court's Indian taxation analysis insofar as the cigarette cases grant the state the right to tax non-Indians within Indian Country and the other cases recognize a preemption of state regulation within Indian Country, even in regards to non-members. The cigarette cases turned on the Court's reasoning that non-Indians cannot enter the Indian Country and immediately leave the Indian Country after purchasing a product in which the Indian tribe has added no value and attained no real interest, the sole purpose of which is to escape state taxation.

The recent decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905 (1991) is not to the contrary. In *Washington v. Confederated Tribes of Colville*, the Supreme Court stated:

> [w]hile the Tribes do have an interest in raising revenues, the interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.

Colville, 447 U.S. at pp. 156-157. In the case at bar, the income is generated within Indian Country, and the taxpayer-employees and vehicle owners benefit from tribal government services and regulations which protect workers through an extensive and broad tribal code, police, courts, and other modern governmental functions. Thus even non-member workers are recipients of the services of tribal government, and non-members income should not be taxed when earned within Indian Country. There is no marketing of a tax exemption which was looked at with disfavor in *Colville*.

Likewise, the motor vehicles being taxed are stored within Indian Country and the individuals being taxed are the recipients of tribal government services. Off reservation dwellers are not allowed to tag and title with the Sac and Fox Tax Commission but must reside within Indian Country – trust allotments, dependent Indian communities, and reservation areas. The Oklahoma Tax Commission's income and motor vehicle taxes are directed at activity and property within the Indian Country. Thus the state taxes are preempted. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Whereas other activities within Indian Country, especially those in which the Federal Government must protect Indian property pursuant to its trust responsibility, have experienced such extensive federal regulation of the activities or programs that the state was held to be preempted from interfering, the fundamental federal policy that Tribal governments are to be free from outside interference is evidenced by, in general, the lack of federal regulations concerning the manner in which the tribe conducts its tribal government. The Court has previously recognized the possibility of creating a dichotomy whereby the tribes would have to prove extensive regulation by the federal government in order to protect tribal sovereignty:

> We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination.

Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 846 (1982) (citations omitted).

In fact, the federal government's commitment to emancipate tribal governments from all attempts by others to dictate the manner in which the tribes may determine the tribes' destiny resulted in the enactment of the Indian Self-determination Act:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

Act of October 5, 1988, Pub.L. 100-472, Title I, § 102, 102 Stat. 2285 (1988). The legislative history of the 1988 Amendments to the Self-determination Act noted "The Act was intended to assure maximum participation by the Indian tribes in planning and administration of federal services, programs and activities for Indian communities." Senate Report 100-274, 1988 USCCAN Leg. Hist. 2620. Thus the lower courts in this action should have held that income from tribal sources was free from state taxation. The Congressional statements concerning the intent that tribes are to assume responsibility for administering governmental functions could not be clearer. Here the state taxation of non-members is not merely upon businesses or functions important to the tribal government, but is upon activities of the tribal government, that is, employing government workers and supporting growth of the reservation economy. Congress has taken

the business of tribal government so fully in hand that no room remains for the state's additional imposition. Thus, as in *Warren*, the assessment and collection of the tax would substantially frustrate the intent of Congress in ensuring that no burden be placed upon the tribal government's efforts at self-determination except as authorized by the Congress. *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965).

B. Recent Congressional Enactments Indicate that the Court Should Reconsider Its Position on Several Matters Relied Upon by the Court Below, Even if Those Positions were Otherwise Properly Relied Upon By The Tenth Circuit.

The Court below decided this case directly contra to the holdings of the State Court cases mentioned in Roman Numeral I above, choosing instead to apply the analysis of the "Indian smokeshop" cases decided by this Court. In the "smokeship" cases, a distinction was drawn between taxation of tribal members, and other persons, when the Indian seller contributed no value to the transaction, and instead, merely imported cigarettes into the Indian Country for sale to, and immediate export by, non-Indians who, but for the claimed exemption from the state tax imposed upon those purchasers, would not have come to the Indian Country to make their purchases. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905 (1991). While they should not be applicable here because these employees and automobile

owners work and/or live within the Tribal jurisdiction as opposed to the transient visits of such persons in the cigarette cases, and because the value being taxed here would not exist but for the Tribes, these cases began a process whereby this Court began to make stated distinctions between Indians of the local tribe, and other Indians and non-Indians residing in the Indian Country with them.

This new judicially created distinction reached its apex in *Duro v. Reina*, ___ U.S. ___, 110 S.Ct. 2053 (1990), in which this Court held that Indian Tribes had, by implication, lost their criminal jurisdiction over members of other Indian tribes committing offenses against the local laws of the Tribe. This distinction between Tribal member Indians and non-Tribal member Indians, however, has been flatly and firmly rejected by Congress. *See*, Act of October 28, 1991, Pub.L. 102-137, 105 Stat. 646, amending Section 8077 of Public Law 101-511 (104 Stat. 1892) by striking out the time limitation contained in subsection (d) of P.L. 101-511 thereby making the Congressional recognition of inherent tribal criminal jurisdiction over Indians of other tribes permanent. Congress has expressly stated that Indian Tribes retain, even in criminal cases, their inherent jurisdiction over all Indians within their Indian Country, and has expressly defined the term "Indian" to mean any person who would be subject to federal prosecution under the Major Crimes Act, 18 U.S.C. § 1151, in the Indian County. Act of November 5, 1990, Pub.L. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892.

In House Conference Report No. 102-261 on P.L. 102-137, 1991 USCCAN Leg. Hist. 379, the Committee on

Conference on the bill to permanently "correct" the Court's *Duro* decision stated as follows:

> The Committee of Conference is clarifying an inherent right which tribal governments have always held and was never questioned until the recent Supreme Court decision of *Duro v. Reina*, 110 S.Ct. 2953 [sic] (1990). The Congressional power to correct the Court's misinterpretation is manifest as is its plenary power over Indian tribes which derives from the Constitution.
>
> The Committee of the Conference asserts that the Congressional power over Indian tribes allows this recognition of the inherent right of tribal governments to retain this jurisdiction and notes that two fundamental maxims of Indian law come into play in this legislation. First, as Justice Kennedy stated in the *Duro* decision, Congress determines Indian policy. Second, Indian tribes retain all rights and powers not expressly divested by Congress. These principles go back to the decisions of Chief Justice John Marshall and are part of the foundation of the federal tribal relation. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

This statement by the Congressional Committee of Conference, and similar statements found in recent legislation and reports from Congress, indicate that recent rulings by this Court departing from the "conceptual clarity" of the *Worcester* doctrine and turning away from direct reliance on the traditional doctrine of Indian sovereignty, *McClanahan*, failing to find general Commerce Clause preemption of State action absent express Congressional authorization, *Colville*, and imposing implied

limitations of Tribal authority while distinguishing individual status, *Duro,* may well be out of step with the policies and expectations on Congress. Accordingly, it is submitted that the Court should review and reconsider its posture on these matters, all of which are at issue in this case, and conform the rulings of the Court to the positions expressed by the Congress, which is granted exclusive authority to regulate commerce with the Indian Tribes by Article 1, Section 8, Clause 3 of the United States Constitution.

CONCLUSION

For the reasons stated, the Court should grant the Sac and Fox Nation's Cross Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

G. William Rice, Esq.*
Attorney General
Sac and Fox Nation

Gregory H. Bigler, Esq.
Assistant Attorney General

124 N. Cleveland
Cushing, Oklahoma 74023
(918) 225-4800

Attorneys for Cross-Petitioner

*Counsel of Record

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SAC AND FOX NATION,

Cross-Petitioner,

v.

OKLAHOMA TAX COMMISSION,

Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

DAVID ALLEN MILEY, *OBA#11933
Assistant General Counsel
OKLAHOMA TAX COMMISSION
DAVID HUDSON, OBA#4439
General Counsel
2501 Lincoln Boulevard
Post Office Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141

Attorneys for
Cross-Respondent

* Counsel of Record

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OKLAHOMA TAX COMMISSION,

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

The Cross-Respondent, Oklahoma Tax Commission, respectfully requests that this Court deny the Cross-Petition for a Writ of Certiorari filed by the Sac and Fox Nation seeking review of the Tenth Circuit's opinion in this case pertaining to the questions presented in the Cross-Petition. That opinion is reported at 967 F.2d 1425 (1992).

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

NON-TRIBAL MEMBERS ARE SUBJECT TO STATE TAXATION WITHIN INDIAN COUNTRY.

The Sac and Fox Nation, Tribe hereafter, is attempting to reach a novel and far-reaching conclusion in its Cross-Petition that any non-tribal member who is subject to tribal taxation is automatically exempt from any state taxes for which the nonmembers may be responsible.

Specifically, if a nonmember of the Tribe pays income taxes and motor vehicle taxes to the Tribe, then that nonmember is exempt from

state imposed income and motor vehicle taxes under the Tribe's theory. The benefit of this theory to the Tribe is that tax revenues which rightfully belong to the State would be diverted from the State to the Tribe. The problem with the Tribe's plan is that there is no authority for it. The Tenth Circuit correctly rejected the Tribe's theory in its decision below and found that the Indian Commerce Clause does not bar state taxation of nonmembers on Indian Country, the Tribe cites no authority showing that any court has interpreted the jurisdictional language of any Indian treaty so as to grant a tribe exclusive jurisdiction over non-tribal members, the Indian gaming decision's relied on by the Tribe were distinguishable from the situation of the state's taxation of nonmember's income and motor vehicles and the Tribe has failed to show how the imposition of a state tax on nonmembers frustrates tribal self-government.

The state has all right, jurisdiction and authority to tax non-tribal members on Indian Country, see *Thomas v. Gay*, 169 U.S. 264 (1898), cattle owned by non-Indian and grazed on Indian Country leased from tribe were taxable by the state, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), non-Indians who undertake activity on Indian Country are taxable by state, *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), non-Indians purchasing cigarettes from tribal stores on Indian Country are subject to state taxes, *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989), non-Indian oil and gas producer whose operations were located on Indian reservation was subject to state oil and gas taxes.

The Tribe urges in its Cross-Petition that the Tenth Circuit opinion is in conflict with several state courts of last resort which have held that the income or property of Indians who are not members of the reservation tribe within whose Indian Country they reside are not taxable by the state. The Commission would point out that the Tenth Circuit's opinion below is not in conflict with any decision of the Oklahoma Supreme Court and that the Tribe never explains why or how the Tenth Circuit is bound by decisions of other state courts on this federal question, and on top of all that, the decisions of other state courts regarding the administration of tax law in other states has no bearing on how Oklahoma administers its tax law. The state court decisions cited by the Tribe involve different states, different laws and different circumstances from the case at bar and

provide no authority for the Tribe to effectively shelter thousands of non-tribal members from Oklahoma taxes. How another sister state administers its tax law has no effect on Oklahoma tax administration. The question is, does Oklahoma's administration comport with federal law and policy. This Court has held that it does. Oklahoma has the authority to tax non-tribal members within Indian Country, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, _____ U.S. ____, 111 S.C. 905 (1991). In *Colville* this Court held, "Federal statutes, even given the broadest reading to which they are susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe."

The Tribe next urges that the Tenth Circuit should have used provisions in the Treaty of Fort Harmar of 1789, 7 Stat. 28, to grant the Tribe exclusive jurisdiction over all persons who "settle upon their lands," leaving no room for state taxation of either tribal members or nonmembers.

The authority of that treaty is dubious because it does not represent the final word from Congress regarding the Sac and Fox and does not contemplate the Tribe's removal to Indian Territory which was, at that point, *In Futuro*. In fact, the treaty of 1789 was consummated before the United States had acquired the territory encompassing the State of Oklahoma in the Louisiana Purchase of 1803. The treaty also preceded the Tribe's removal to Indian Territory (1867), the disestablishment of the tribal reservation (1891) and Oklahoma statehood (1907). There has been a lot of water under the bridge since the Tribe negotiated its more ancient treaties. The laws regarding the Sac and Fox have changed since 1789, and that prerogative is owned by Congress, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

It is not unusual that Congress has changed the laws, rights or entitlement of Indian tribes and, in fact, Congress has done so often. This Court ruled on the subject in *The Cherokee Tobacco*, 11 Wall. 616 (1871), where this Court ruled:

> A treaty may supersede a prior act of Congress...and an act of Congress may supersede a prior treaty.... In the cases referred to, these principles were applied to treaties with

> foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief. (Citations omitted)

The Sac and Fox are governed by different laws than those granted in the 18th century due to changing circumstances and the ceaseless movement of time. Because of the decisions of Congress in the interval, the Treaty of Fort Harmar is unreliable.

In Section II of the Cross-Petition, the Tribe asserts that tribally derived income of non-tribal members should be exempt from state taxation. The Tribe cites several decisions of this Court which prevented the particular states involved from taxing certain nonmembers on the reservation under certain conditions. The cases usually involved business activity of a non-Indian company doing business on an Indian reservation under federal regulations. This Court held that a state cannot tax a non-Indian business on the reservation when federal laws or regulations have pre-empted the state law.

The problem with the Tribe's argument in this case is that the Tribe has not indicated where federal law has pre-empted Oklahoma's income and motor vehicle taxes. Also, the Tribe has failed to show how the taxation of non-tribal members infringes on tribal self-government. Further, the Tribe has not provided any reason why this Court should review the questions presented in its Cross-Petition concerning the Appeal Court's opinion.

CONCLUSION

For these reasons, the Oklahoma Tax Commission respectfully requests this Court to deny the Cross-Petition for Writ of Certiorari filed by the Sac and Fox Nation.

Respectfully submitted,

DAVID ALLEN MILEY,* OBA#11933
Assistant General Counsel
OKLAHOMA TAX COMMISSION
DAVID HUDSON, OBA#4439
General Counsel
2501 Lincoln Boulevard
Post Office Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141

Attorneys for
Cross-Respondent

* Counsel of Record